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July 7, 2020

Chairperson Ellen Dohmen
Bar Harbor Board of Appeals
Town of Bar Harbor
93 Cottage Street
Bar Harbor, Me 04609

Re: BHAPTS, LLC Reply to Second Mills Appeal of Planning Board Approval
of PUD-2017-02/25 West Street Extension

Dear Chair Dohmen and Members of the Board:

Attached is the Reply of BHAPTS that we are filing 2 days early prior to our July 9 deadline and 9 days before the July 16 hearing; pursuant to Section 125-103(C)(1)(b), we enclose 12 hard copies of the BHAPTS Reply and Exhibits. We wanted to give the Board the majority of this week and much of next week to review our Reply and the Exhibits from the Record from these long proceedings before the Town; please see Exhibit A through K.

As counsel for Ms. Mills has done, we are providing 12 hard copies on Tuesday, July 7, 2020, but are also filing our materials electronically to Mr. Fuller at the Planning Office so that he can provide to each member today an electronic copy of our Reply, our Exhibits A through K, and also another copy of the April 29, 2020 Transcript in electronic form. That transcript appears at the back of our material.

We ask that the Board take some time now to review the BHAPTS record Exhibits, the Reply, and the Transcript so that the Board of Appeals can review the careful deliberations of the Planning Board on remand from the Board and also the precise method used by the Planning Board on remand to determine that (1) the *base development density* of the BHAPTS lot is 8 market units; (2) that *the total allowable units* of 16 are calculated by applying each of 125-69(S)(6)(a)[2][a],[e], and[h] in order to determine that, in addition to the base development density of 8 market units, the Project is allowed 2 additional market units for both undergrounding of utilities and pedestrian amenities and then 3 more market units for 3 affordable units for a total of 13 market units and 3 affordable units, and (3) the total number of *affordable units* required is 3 units.

In the Mills appeal, Attorney Grief has argued that the number of affordable units should be 5 units, but his argument is not supported by the record in these proceedings or the LUO provisions read as a whole. Contrary to his most recent claims, he cannot stifle the Record, the LUO provisions or the participants in these long proceedings.

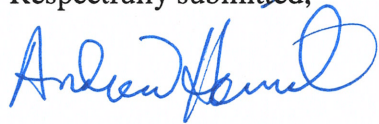
Additionally, Attorney Greif's claim that his appeal raises only legal issues is inconsistent with other sections of his filing that correctly note that there are both fact/ evidentiary claims and legal claims. We disagree with his attempt to argue that, as counsel for BHAPTS, only I can speak on July 16 and that neither Mr. Moore nor Mr. Salvatore can speak. When there are both fact and LUO issues, the BOA has allowed direct representatives and technical representatives and legal representatives to speak. This practice is not only supported by LUO, but also common land use practice and common sense. If the Board were to engage or, even worse, accept this limitation on the rights of BHAPTS as the property owning Applicant and Appellee, the Board would be placed in a position of inconsistency with LUO; that limitation would also undermine the due process rights of a property owner and the basic right of citizens to petition their government; it might also prevent the Board from giving the LUO its rightful application in this proceeding. Both the facts and the law must be reviewed.

For these and other reasons, BHAPTS and its counsel DO object to Attorney Greif's attempt to stifle who can speak for BHAPTS; the Appellee is entitled to have those individuals who can provide specific fact information from the record and address the specific LUO provisions be allowed to address the Board of Appeals. In argument before the Board, Attorney Greif can certainly speak to and even disagree with what any BHAPTS representative may have to say, just as we can disagree with Attorney Greif or Gilbert; by the way, respectfully disagreeing with what another says or argues is precisely what we are sometimes obligated to do in land use proceedings and that is not limited to the attorneys in a proceeding.

As we detail in our Reply, and as supported by the BHAPTS Exhibits, it is now objectively clear that the Planning Board's April 29 findings are supported by substantial evidence and its decision is not clearly contrary to the LUO.

We look forward to the hearing on July 16 and to addressing the Board and the Board's questions.

Respectfully submitted,



P. Andrew Hamilton

cc: Arthur J. Greif, Attorney for Ms. Mills
Daniel A. Pileggi, Attorney for the BH BOA
Michele Gagnon, Planner
Steve Fuller, Assistant Planner
Eben J. Salvatore
Perry N. Moore

Memorandum

To: Bar Harbor Board of Appeals
From: Andrew Hamilton, Esq. and Patrick Lyons, Esq., o/b/o BHAPTS, LLC
Date: July 7, 2020
**Re: BHAPTS, LLC Reply to Second Mills Appeal of
Planning Board Approval of PUD-2017-02**

Dear Chair Dohmen and Members of the Bar Harbor Board of Appeals:

On behalf of Permittee and Appellee BHAPTS, LLC (“BHAPTS”), we respectfully submit this written statement in support of the Planning Board’s Planned Unit Development – Village (“PUD-V”) approval of BHAPTS’s 25 West Street Extension Project (“the Project”). For the reasons set forth below, we ask that the Board of Appeals (“BOA” or “Board”) DENY Ms. Mills’ Appeal.

BACKGROUND AND PROCEDURAL HISTORY

The BOA is well familiar with the background and procedural history of this Project, as this is the third time this matter has appeared before the Board. A comprehensive history of the property and the Project is available in BHAPTS’s April 2, 2019 filing with the BOA in response to the first Mills appeal of the Planning Board’s initial approval of the Project. That filing with its accompanying attachments and exhibits are incorporated by reference herein.

The procedural history and supporting record evidence provided in this filing focuses on information relevant to the narrow issue raised in Ms. Mills’ second appeal, filed June 26, 2020.

In 1986, the property at 25 West Street Extension was developed as 16 multifamily units, consisting of 4 buildings with each containing 4 units under a Planning Board approval that was not appealed. The property was subsequently bought by BHAPTS in 2012.

On December 21, 2017, BHAPTS completed the permit application checklist review with Town Staff for its PUD-V application to the Planning Board, seeking to remodel the 4 existing buildings and to build additional buildings for a total of 18 multifamily units to provide workforce housing.

The original sketch plan proposed February 14, 2018, depicted three new access points for vehicles from Woodbury Road onto the property and driveways accessing existing and new parking adjacent to the new buildings.¹ **BHAPTS Exhibit A, 2/14/2018 Sketch Plan.** At the neighborhood meeting on April 19, 2019, concerns were raised regarding the proposed building on the corner of Woodbury Road and traffic from vehicular use of Woodbury Road.² Then Bar Harbor Planner Jana Richards urged Mr. Salvatore and Mr. Moore to consider “Great American Neighborhood” concepts and focus on a more pedestrian-oriented development.

Accordingly, the June 12, 2018 revised sketch plan removed the proposed vehicular access and new parking areas, and clustered the buildings into a “walk-able campus.” **BHAPTS Exhibit B, 6/12/2018 Sketch Plan.** On June 20, 2018, the Planning Board voiced support for clustering the buildings, eliminating vehicular access onto Woodbury Road, and use of “Great American Neighborhood” concepts. **BHAPTS Exhibit C, 6/20/2018 Meeting Minutes.**

At the request of the Planning Board, views of the proposal were prepared and submitted on September 5, 2018, and reviewed September 19, 2018. **BHAPTS Exhibit D, 9/05/2018 Sketch Plan.** Notably, the minutes of that meeting affirm Jana Richards’ guidance to the Planning Board to consider the “purpose and intent” of the PUD-V section of the LUO as it relates to, among other things: access to local goods, services, and employment; “Great American Neighborhood” concepts; and encouraging infill development, specifically allowing for growth where Town services, roads, and pedestrian access already exist. **BHAPTS Exhibit E, 9/19/2018 Meeting Minutes;** see also §125-69(S)(1).

On December 5, 2018, the Planning Board found BHAPTS’s application to be complete and held a public hearing on the application. Mr. Moore and Mr. Salvatore specifically discussed the Project’s design to foster community and pedestrian access, including removal of a parking lot to limit vehicular use and traffic, designing a walk-able campus and buildings for residents that primarily use bikes or walk as modes of transport, and providing access to Woodbury Road that acts as a “highway for pedestrians.” **BHAPTS Exhibit F, 12/5/2018 Meeting Tr.** at 87-88, 94.

On December 6, 2018, BHAPTS representatives met with Ms. Mills, her son, and neighbor James Blanchard at the Project site to discuss her concerns. As a result, BHAPTS amended its site plan to remove one building near the Mills

¹ See also utility drawings SP-1B and SP-1A dated April 23, 2019. **BHAPTS Exhibits A-1 and A-2.** The Plans show that electrical lines will be installed underground.

² Similar concerns regarding the proposed additional driveway access to Woodbury Road and additional parking spaces were raised by Donna Karlson at the March 21, 2018 Planning Board Meeting. **BHAPTS Exhibit A-3, 3/23/2018 Meeting Minutes.** As discussed, those proposals were removed from the site plan to reduce traffic impacts, increase pedestrian access, and to create a more walkable campus.

property and make the two buildings on West Street three stories each. All relevant design plans were revised for this change and submitted to the Planning Board. The site plan dated 01/06/2019, approved as the site plan of record by the Planning Board, depicts the pedestrian stairs connecting the dwellings to Woodbury Road and sidewalks connecting to the existing walkway network serving the Project. **BHAPTS Exhibit G, 1/6/2019 Site Plan.**

This summary of the evolution of the project concept emphasizes that the new buildings are a ***pedestrian-oriented*** development scheme. It is not simply a question of how much or what kind of amenities have been provided. The record demonstrates that the project concept was shaped with input from Town staff, the Planning Board and neighborhood residents to create a pedestrian-oriented infill development that reduced the negative impacts of vehicular traffic on Woodbury Road and, expands the use of Woodbury Road for pedestrian access to the downtown village. The record is clear, there are pedestrian amenities of sidewalks, stairs and connections to existing sidewalks.

The Planning Board continued the public hearing on January 16, 2019. After closing the public hearing, the Planning Board extensively deliberated and ultimately voted 4-1 to approve BHAPTS's application.

Ms. Mills appealed the Planning Board's decision to the BOA, which dismissed her appeal on procedural grounds. That decision was ultimately overturned by the Maine Superior Court and remanded back to the BOA. On February 11, 2020, the BOA voted to remand the Planning Board's January 16, 2019 decision on three narrow issues: "base development density, maximum allowable units, and required affordable housing only." **BHAPTS Exhibit H, February 13, 2020 BOA Decision.** Otherwise, "[t]he Board of Appeals denied the appeal as to all other issues raised." *Id.*

BHAPTS submitted a revised site plan to the Planning Board on March 12, 2020, for 16 units (compared to 18 units for the previously approved site plan) and a revised floor plan for Building D, converting it from 4 to 2 units. **Mills Exhibit B, 3/12/2020 BHAPTS Submission.** There were no other changes to the previously approved site plan.

On April 29, 2020, the Planning Board conducted a hearing on the narrow remand and voted to unanimously approve BHAPTS's PUD-V permit application, finding that: (1) the base development density is 8; (2) the maximum allowable units is 16; and (3) BHAPTS must provide 3 affordable housing units. **Mills Exhibit A, 5/8/2020 Planning Board Decision.** At the April 29 meeting, Mr. Moore reminded the Planning Board of, among other things, the evidence previously presented regarding pedestrian amenities. **BHAPTS Exhibit I, 4/29/2020 Meeting Tr.** at 54, 60-63. The Planning Board acknowledged this evidence regarding

pedestrian amenities in making its determination that 3 affordable housing units were required. *Id.*

Ms. Mills again filed an appeal of the Planning Board decision. The scope of this appeal only challenges the number of affordable housing units required. This narrow challenge is therefore the only issue before the BOA.³

STANDARD OF REVIEW

The Bar Harbor Land Use Ordinance directs the Board of Appeals (“BOA”) to review appeals of Planning Board decisions on an “appellate” basis only. *LUO Section 125-103*.

When acting in an appellate capacity, the BOA reviews the record to determine whether the Planning Board’s decision was “clearly contrary” to the LUO. *LUO Section 125-103(D)(1)(l)*. Additionally, the BOA must uphold all findings of fact by the Planning Board that are supported by “substantial evidence” in the record. *Id.*

“Substantial evidence” exists when “a reasonable mind would rely on that evidence as sufficient support for a conclusion; the possibility of drawing two inconsistent conclusions does not render the evidence insubstantial.” *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577. The Planning Board’s characterizations and fact-findings as to what meets ordinance standards must be given deference. *Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048. Accordingly, when acting in an appellate capacity, the Board of Appeals does not substitute its judgment for that of the Planning Board. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577.

In addition, the burden of persuasion for an appeal is on the appellant. *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 15, 989 A.2d 1128. Thus, Ms. Mills must demonstrate the Planning Board’s decision is “clearly contrary” to the LUO and that “no competent evidence” exists in the record to support the Planning Board’s decision. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577. Ms. Mills is unable to meet this burden.

³ As a matter of course and to preserve the matter for the record if appealed beyond the BOA, BHAPTS renews its objection to the BOA’s Finding #2 in its February 13, 2020 Decision that “[t]he proposed project contains at least one nonconforming structure.” BHAPTS incorporates by reference the Specific Request for Reconsideration as to BOA Finding #2/ Reconsideration Application filed on February 20, 2020.

ARGUMENT

I. The Planning Board's requirement of 3 affordable units is wholly consistent with, and not contrary to, the Bar Harbor LUO.

The Planned Unit Development – Village (“PUD-V”) district requirements are set out in § 125-69(S) of the Bar Harbor Land Use Ordinance (“LUO”). Affordable housing requirements for PUD-V are set out in § 125-69(S)(6)(b), specifically:

Affordable units and lots. In the final plan the minimum number of affordable units or lots must be 20% of the base development density. These units and lots must be in compliance with § 125-69R.

As the Planning Board determined, the base development density of the Project is 8. 20% of 8 is 1.6. As the LUO holds, and as Ms. Mill's concedes, 1.6 is rounded down to 1 per § 125-69(R)(3)(f). *Mills Brief* at 2.

However, as set out in § 125-69(S)(6)(a)[2], an increase in the number of dwelling units allowed beyond the base development density shall be considered by the Planning Board if an applicant can satisfy various provisions.⁴ See § 125-69(S)(6)(a)[2][a]-[h]. Three of those provisions are applicable here:

[a] For every additional affordable dwelling unit, an additional market-rate dwelling unit may be allowed.

...

[e] For projects that propose to construct new pedestrian amenities to connect the proposed development to other areas, amenities or goods and services, an additional market-rate dwelling unit may be allowed.

...

[h] For projects that place all public utilities, other than stormwater management systems, underground on the application parcel, an additional market-rate dwelling unit may be allowed.

Starting at a base development density of 8, the Planning Board found BHAPTS qualified for 2 additional market-rate units: 1 for new pedestrian amenities and 1 for the undergrounding of utilities. Then, the Planning Board found BHAPTS

⁴ While not at issue before the Planning Board following the BOA's narrow remand (but as extensively discussed in BHAPTS's April 2, 2019 filing with the BOA in response to Ms. Mill's first appeal), BHAPTS is grandfathered as to the 16 market units currently located at 25 West Street Extension. As a matter of course and to preserve this for the record in the event of any appeal beyond the BOA, BHAPTS renews its assertion that pursuant to its grandfathered rights, BHAPTS already has the right to reconfigure these 16 units (grandfathered as to lot size only) under 125-53(D) and 125-56 and is not and cannot be required to surrender those 16 units. The fact that the total allowed number of units per § 125-69(S)(6)(a)[2] equals 16 units is now a coincidence of history; either way, BHAPTS is entitled to the 16 units.

qualified for 3 more market-based units by providing three affordable dwelling units. *5/8/2020 Planning Board Decision* at 2. Using the same nomenclature as in the Mills Brief, this calculation is depicted as follows: **9-M (pedestrian amenities); 10-M (underground utilities); 11-A; 12-M; 13-A; 14-M; 15-A; 16-M.**

A summary table of the market units, affordable housing units, and total units allowed by the LUO is set forth below for ease of reference:

Unit Allowance Category	Allowable Units
Base Development Density	8 Market Units
Pedestrian Amenities	1 Market Unit
Underground Utilities	1 Market Unit
3 Affordable Units	3 Market Unit
Market Subtotal	13 Units
Affordable Housing Subtotal	3 Units
TOTAL UNITS	16 Units

Contrary to Ms. Mills’ assertion, none of the 8 units in the base development density calculation is an affordable housing unit. It is true that if only 8 units were to be built, 1 unit might then be required as an affordable unit, as that is 20% of the base development density. However, the plain language of § 125-69(S)(6)(b) is clear: “the minimum number of affordable units . . . must be 20% of base development density.” *See 21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 12, 153 A.3d 113 (“When we interpret an ordinance, we look first to the plain meaning of its language, and if the meaning of the ordinance is clear, ‘we need not look beyond the words themselves.’” (quoting *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 23, 82 A.3d 148))).

Here, the number of affordable dwelling units (the 3 units) required by the Planning Board decision far exceeds the number that is the product of 20% of base development density (or 1 unit). The Planning Board correctly calculated both the number of market units (13) and affordable units (3) under its application of 125-69(S)(6)(a)[2] and determined that BHAPTS was allowed 5 additional market-units and required to have 3 additional affordable housing units beyond the base development density of 8. Said another way, the affordable housing requirement is not determined until the base development density is first calculated and then any

increases in the number of dwelling units allowed above the base development density is considered pursuant to § 125-69(S)(6)(a)[2][a]-[h].⁵

The Planning Board's determination of the number of required affordable housing units is not "clearly contrary" to the LUO.⁶ § 125-103(D)(1)(l). Indeed, it

⁵ There was a minor transcription error in the Planning Board's written decision where it was written:

Per 126-69 S. (6)(b), the number of base affordable rent units is 5. However, it was determined that the applicant only needs to provide three affordable rent units as the applicant received credit for two affordable rent units as follows: per 125-69 S. (6)(a)[2][e] – one unit for being pedestrian friendly and per 125-69 S. (6)[a][2][h] one unit for the provision of underground utilities.

5/8/2020 Planning Board Decision at 2. This is a slight but important transcription error of both the method and approval motion of the Planning Board. Specifically, BHAPTS did not "receive credit" to reduce the number of required affordable housing units from 5 by providing pedestrian amenities and underground utilities; rather, in his articulation of the approval decision motion, Member Fitzpatrick correctly applied 125-69(S)(6)(a)[2] only after he first determined that the base development density is 8 market units, and that BHAPTS secured 2 additional market units for (1) providing undergrounding utilities, and (2) providing pedestrian amenities, then 3 more market units for providing 3 affordable units using the 1-to-1 rule of 125-69(S)(6)(a)[2][a]. Indeed, the transcript from the April 29, 2020 Planning Board meeting confirms this:

MR. FITZPATRICK: Let's see, okay. So in response to the Bar Harbor appeals board decision, specifically related to AB-2019-01 dated February 13th, 2020, I would move to approve the subdivision site plan PUD-2017-02, BHAPTS with the condition the subdivision plan be recorded in the registry of deeds, stamped by a public land surveyor prior to being signed by the planning board as it complies to LUO specifically as follows:

The planning board finds that the base development density number based on LUO Section 125-69S(6)(a)(1) to allow 8 units. The planning board also finds based on LUO Section 125-69S(6)(a)(3) that the maximum allowable units under the PUD shall be 16. And the planning board also finds based on LUO Section 125-69S(6)(b) that the number of base affordable units shall be 3, and finds that with the applicant providing 1 additional unit for the provision of underground utilities -- that's a market unit -- 1 additional market unit for the provision of amenities as outlined in 125-69S(6)(a)(2)(e) for a total of 13 market units and 3 affordable units.

4/29/2020 Meeting Tr. at 60; *see also id.* at 61-63 (the subsequent discussion by the Planning Board and Attorney Bearor to clarify Mr. Fitzpatrick's motion and then the unanimous vote to approve).

⁶ Even if the BOA found the LUO to be ambiguous as to affordable housing requirements, land use ordinances are in derogation of common law private property rights and any ambiguities in an ordinance must be resolved in favor of the property owner's proposed use. *Forest City, Inc. v. Payson*, 239 A.2d 167, 169 (Me. 1968). Because zoning ordinances are in derogation of private property rights, they are given strict interpretation and may not be extended by implication to limit a landowner's proposed use. *Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 316 (Me. 1967). Again, as revised and approved at the April 29, 2020 Planning Board meeting, the reduced units of 16 in the revised and final application exactly matches the grandfathered number of 16 units; these units cannot now be taken away based on any ambiguity in the LUO.

adheres to and is consistent with the plain language of the LUO and accordingly should be upheld by the BOA.

II. There is substantial evidence in the record supporting the Planning Board's finding that BHAPTS provided "pedestrian amenities."

As discussed, an additional market-rate unit may be allowed for a PUD-V project if the applicant proposes "to construct new pedestrian amenities to connect the proposed development to other areas, amenities or goods and services." § 125-69(S)(6)(a)[2][e].

There is substantial evidence in the record to support the Planning Board's determination that BHAPTS site plan provides new pedestrian amenities that connects the Project to Bar Harbor's downtown:

- Following concerns raised by neighbors and a request from Planning Staff to consider "Great American Neighborhood" concepts and a focus on more pedestrian-oriented development, the June 12, 2018 revised sketch plan removed proposed vehicular access, new parking areas, and clustered the buildings into a "walk-able campus." *Compare **BHAPTS Exhibit A**, 2/14/2018 Sketch Plan to **BHAPTS Exhibit B**, 6/12/2018 Sketch Plan.*
- On June 20, 2018, the Planning Board voiced support for clustering the buildings, eliminating vehicular access onto Woodbury Road, and use of "Great American Neighborhood" concepts. ***BHAPTS Exhibit C**, 6/20/2018 Meeting Minutes.*
- At the September 19, 2018 Planning Board Meeting, Planning Staff advised the Planning Board to consider the "purpose and intent" of the PUD-V section of the LUO as it relates to, among other things: access to local goods, services, and employment; "Great American Neighborhood" concepts; and encouraging infill development, specifically allowing for growth where Town services, roads, and pedestrian access already exist. ***BHAPTS Exhibit E**, 9/19/2018 Meeting Minutes; see also § 125-69(S)(1).*
- At the December 5, 2018 Planning Board hearing Mr. Moore and Mr. Salvatore specifically discussed: the Project's design to foster community and pedestrian access, including removal of a parking lot to limit vehicular use and traffic; designing a walk-able campus and buildings for residents that primarily use bikes or walk as modes of transport; and providing access to

Woodbury Road that acts as a “highway for pedestrians.” **BHAPTS Exhibit F, 12/5/2018 Meeting Tr.** at 87-88, 94.

- The site plan dated 01/06/2019, approved by the Planning Board, depicts the pedestrian stairs connecting the Project to Woodbury Road and sidewalks connecting to the existing walkway network serving the Project. **BHAPTS Exhibit G, 1/6/2019 Site Plan.**
- At the April 2020 Planning Board hearing, Mr. Moore reminded the Planning Board of the evidence previously presented regarding pedestrian amenities. **BHAPTS Exhibit I, 4/29/2020 Meeting Tr.** at 54, 60-63. The Planning Board acknowledged this evidence regarding pedestrian amenities in making its determination that 3 affordable housing units were required. *Id.*

The BOA must defer to all findings of facts by the Planning Board supported by “substantial evidence” in the record. *LUO Section 125-103(D)(1)(l)*. As the record makes clear, there was substantial evidence before the Planning Board supporting its unanimous decision to find BHAPTS proposed “to construct new pedestrian amenities to connect the proposed development to other areas, amenities or goods and services.” § 125-69(S)(6)(a)[2][e].

Ms. Mills notes that “pedestrian” and “amenities” are not defined in the LUO, and thus we must rely on the definitions in Webster’s New Collegiate Dictionary to give these words meaning. § 125-108A. “Amenity” is defined by Webster as “something that helps to provide comfort, convenience, or enjoyment.” “Pedestrian” is defined as “relating to or designed for walking.” Read together, “pedestrian amenities” are something that provide convenience for walking. This is exactly what BHAPTS’s proposal does when it was revised from 3 vehicular driveways in the February 2018 sketch plan conception to the walkways sketch plan conception submitted on June 18, 2018. BHAPTS Exhibits A-I, inclusive, are each and all record materials in this proceeding and provide more than substantial evidence to support the Planning Board’s April 29, 2020 finding that the Applicant is providing pedestrian amenities. Attorney Grief’s attempt to stifle all relevant members of the BHAPTS applicant team from speaking at the July 16, 2020 hearing based on “no new facts and only the law” is unavailing since the record already contains the factual information he seeks to prevent the BHAPTS from submitting.

Moreover, despite Ms. Mills’ arguments, BHAPTS provides more pedestrian amenities than just the stairway connecting the Project to Woodbury Road (although that amenity alone “connect[s] the proposed development to other areas, amenities or goods and services”). The Project is designed to be a “walkable campus,” limiting vehicular access and promoting the use of Woodbury Road to walk or bike to and from downtown Bar Harbor. Exemplifying this, the three new buildings (Buildings E, F, and G) have no direct access to parking and are instead

designed to provide direct pedestrian access to Woodbury Road. The record (including the April 19, 2018 site visit by the Planning Board) demonstrated that the proposed location of the stairway is based on a footpath worn into the side of the road by residents *currently* accessing the site by walking along Woodbury Road. **BHAPTS Exhibit G, 1/6/2019 Site Plan.** Indeed, BHAPTS's tenants predominantly come from outside the United States to work in Bar Harbor's hospitality industry and many do not have a car to commute to and from work.⁷

Please note that §125-69(S)(6)(a)[2][e] does not provide a minimum quantity for the pedestrian amenities. It states they must be "new" and "connect to other areas, amenities or goods and services..." The record is clear that the amenities approved on the plans meet those conditions.

While it had been and remains the hope of BHAPTS that the Town Council will provide additional pedestrian amenities such as a sidewalk to aid BHAPTS tenants to walk or bike to and from downtown Bar Harbor, the fact that the Town has not yet advanced that work does not negate all the pedestrian amenities the Project does provide. Moreover, "substantial evidence" is "any competent evidence" that reasonably supports the factfinder's findings of fact. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577. Even if public sidewalks have not yet been installed at this location, that does not negate all other pedestrian amenities provided in the site plan of the Applicant; Maine law requires that Ms. Mills show that "no competent evidence" exists in the record to overturn the Planning Board's findings. *Id.* Failure to recognize the value of developments which are pedestrian-oriented and which will reduce or eliminate vehicular access is contrary to the purpose and intent of §125-69(S) and would only discourage future developments from considering this alternative. Ms. Mills has failed to meet the burden of showing that the Planning Board's pedestrian amenity and related findings are

⁷ Sadly, the record shows that Ms. Mills and others in opposition to BHAPTS's efforts made specific statements against BHAPTS's tenants relating to their national origin. At the January 16, 2019 Planning Board meeting, Attorney Greif challenged BHAPTS as having employees "coming up from Jamaica and wherever else." **Exhibit J, January 16, 2019 Meeting Tr.** at 38. Most troubling of all, at the December 5, 2018 meeting, Ms. Mills said the following:

They feel caged like animals, rats, and slaves and allowed no dignity, and they let their anger rage late at night. I have seen a toilet thrown out of one of the Acadia Apartments' windows and a front door hacked out by very angry hotel worker men late at night.

...

Acadia Apartments is becoming a big risk to our neighborhood's health and safety for our daughters and granddaughters with these people running around late at night.

...

Our Great American Neighborhood will suffer greatly. Our neighborhood has exceptional families living there. . .

Exhibit K, December 5, 2018 Meeting Tr. at 35-36 (emphasis added).

unsupported by substantial evidence in the record and accordingly the BOA should uphold the Planning Board's findings.

III. Attorney Greif's desire to limit who speaks for BHAPTS is wholly inconsistent with land use practice under the Bar Harbor LUO.

Granting Attorney Greif's request to limit who may speak on behalf of BHAPTS would violate BHAPTS's constitutional rights to freedom of speech and right to petition the government. *Gaudette v. Davis*, 2017 ME 86, ¶ 6, 160 A.3d 1190; see U.S. CONST. AMEND. I and XIV; ME. CONST. ART. I, § 4 and § 19. Indeed, the Bar Harbor LUO provides no authority to limit who speaks on behalf of a land use permittee – any such provision would be unconstitutional. Attorney Greif says that it's only necessary for a lawyer to address legal arguments on July 16.

But Attorney Greif contradicts himself, asserting Ms. Mill's appeal is solely appellate review and only involves legal argument, but later frames the issue of "pedestrian amenities" as:

both a legal challenge to the Planning Board's conclusion as to what 'new pedestrian amenities' means and an evidentiary challenge that the findings that such a stairway was supported by any evidence, let alone the required 'substantial evidence' that would allow this Board to defer to the Planning Board's finding.

Mill's Appeal at 3 (emphasis added).

BHAPTS and its counsel DO object to Attorney Greif's attempt to stifle who can speak for BHAPTS; the Appellee is entitled to have those individuals who can provide specific facts from the record address the Board in this appeal. Mr. Greif should not be heard to prevent Mr. Moore or Mr. Salvatore as direct representatives of BHAPTS from appearing with Attorney Hamilton to address the Board.⁸

Our ability to speak on this issue and others is critical to BHAPTS's constitutional right to address the BOA and defend the Planning Board's approval of the Project.⁹ Mr. Greif's arguments are not purely "legal"; he seeks to reduce the July 16 hearing to an exercise of semantics around a single subsection. But the BOA has a different calling and should resist efforts to undercut the value of the Board's knowledge of the overall LUO, how applying LUO holistically involves the synthesis

⁸ In argument before the Board, Attorney Greif can certainly speak and attempt to disagree with what any BHAPTS representative may have to say, just as we can disagree with Attorney Greif or Gilbert; by the way, disagreeing professionally is what we are sometimes obligated to do in land use proceedings.

⁹ Mr. Moore has worked on this application for several years and with the LUO as a design professional for more than 25 years. He is well qualified and should be allowed to speak on matters of fact and LUO before the BOA. Mr. Salvatore is a direct representative of the Applicant.

of how the sections relate to each other, and – more importantly – how the purpose and intent of §125-69(S) informs how the Planning Board is to review PUDs.

CONCLUSION

Ms. Mills fails to meet her burden to show the Planning Board findings are not supported by substantial evidence and its decision is clearly contrary to the LUO. Indeed, the transcript of the April 29, 2020 Planning Board deliberations and decision demonstrates the care that the Planning Board took to address all 3 factors used by this Board of Appeals to remand to the Planning Board. The Record also more particularly demonstrates that (1) the Planning Board findings of April 29, 2020 are most certainly supported by substantial evidence, and (2) the Board' legal conclusions, based on a carefully articulated approval motion, careful deliberations and careful advice from Attorney Ed Bearor at the April 2020 hearing, were clearly consistent with (and not clearly contrary to) the specific provisions of the LUO.

BHAPTS respectfully requests the Board of Appeals DENY Ms. Mills' appeal.